UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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ARROWOOD INDEMNITY COMPANY, a Delaware corporation, formerly known as ROYAL INSURNACE COMPANY, and successor to ROYAL GLOBE INSURANCE COMPANY,

Plaintiff,

v.

CITY OF WEST SACRAMENTO; and ROES 1-50, inclusive,

Defendant.

No. 2:21-cv-00397 WBS JDP

ORDER RE: CROSS MOTIONS FOR SUMMARY JUDGMENT

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This is an insurance coverage dispute concerning whether plaintiff Arrowood Indemnity Company ("Arrowood") has an obligation, under its duty to indemnity to pay a Stipulated Judgment against its insureds in a related action, City of West Sacramento v. R and L Business Management, 2:18-cv-900-WBS-JDP (the "R&L Action"). Before the court are the parties' cross motions for summary judgment. (Docket Nos. 41, 48.)

I. Factual and Procedural Background

As detailed in the court's previous order on the City of West Sacramento's (the "City") Motion to Dismiss, (Docket No. 21), the City filed an environmental enforcement action against R and L Business Management ("R&L") as the successor in interest to Stockton Plating, Inc., John Clark, and the Estate of Nick Smith, Deceased, among others, to address environmental contamination at and emanating from 319 3rd St., West Sacramento, California (the "Site"). (Pl.'s First Amended Complaint ("FAC") at ¶ 13 (Docket No. 9).) On March 10, 2021, the court entered a stipulated judgment against the R&L defendants in favor of the City. (See id., Ex. F at 16-139.)

On March 3, 2021, Arrowood filed this suit seeking a declaration that it has no obligation to satisfy the stipulated judgment because the four insurance policies it and its predecessor had issued to the R&L defendants between 1976 and 1986 do not provide coverage. (See FAC at ¶¶ 48-53.) Alternatively, Arrowood seeks a declaration that even if it has a duty to satisfy the stipulated judgment, the applicable policy limit is $500,000. (See id. at ¶¶ 54-59.)

II. Summary Judgment Standard

A party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact as to the basis for the motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A material fact is one that could affect the outcome of the suit, and a genuine issue is one that could permit a reasonable trier of fact to enter a verdict in the non-moving party's favor. Anderson v. Liberty Lobby,

Inc., 477 U.S. 242, 248 (1986). The moving party can satisfy this burden by presenting evidence that negates an essential element of the non-moving party's case. Celotex, 477 U.S. at 322–23. Alternatively, the movant can demonstrate that the non-moving party cannot provide evidence to support an essential element upon which it will bear the burden of proof at trial. Id. Summary judgment is appropriate when, viewing the evidence in the light most favorable to the non-moving party, there is no genuine dispute as to any material fact. Acosta v. City Nat'l Corp., 922 F.3d 880, 885 (9th Cir. 2019) (citing Zetwick v. Cnty. of Yolo, 850 F.3d 436, 440 (9th Cir. 2017)).

Where, as here, parties submit cross-motions for summary judgment, "each motion must be considered on its own merits." Fair Hous. Council of Riverside Cnty., Inc. v. RiversideTwo, 249 F.3d 1132, 1136 (9th Cir. 2001) (internal citations and alterations omitted). "[T]he court must consider the appropriate evidentiary material identified and submitted in support of both motions, and in opposition to both motions, before ruling on each of them." Tulalip Tribes of Wash. v. Washington, 783 F.3d 1151, 1156 (9th Cir. 2015). Accordingly, in each instance, the court will view the evidence in the light most favorable to the non-moving party and draw all inferences in its favor. ACLU of Nev. v. City of Las Vegas, 333 F.3d 1092, 1097 (9th Cir. 2003) (citations omitted).

III. Discussion of the Parties' Arguments

A. Policies' Insuring Clause

In support of its motion, Arrowood argues that the stipulated judgment is not covered by the four policies' insuring

agreement. (Pl.'s Mot. at 14 (Docket No. 41).) Each policy contains the same insuring agreement, which states: "The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence . . . ." (Def.'s Statement of Facts in Opp'n to Pl.'s Mot. ("Def.'s Statement of Facts") at ¶ 2 (Docket No. 55-4) (emphasis added).) The policies define "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." (Id. at ¶ 4.) The burden is on the "insured to establish that the occurrence forming the basis of its claim is within the scope of insurance coverage." Aydin Corp. v. First State Ins. Co., 18 Cal. 4th 1183, 1188 (1998).

An "accident" is defined as "an unexpected, unforeseen, or undesigned happening or consequence from either a known or unknown cause" and "refers to the conduct of the insured for which liability is sought to be imposed on the insured." Delgado v. Interinsurance Exch. of Auto. Club of S. Cal., 47 Cal. 4th 302, 308, 311 (2009). An event is not an accident when "all of the acts, the manner in which they are done, and the objective accomplished occurred as intended by the actor." Id. at 312. The insured's intention to cause, or not cause, an injury is irrelevant. See Collin v. Am. Empire Ins. Co., 21 Cal. App. 4th 787, 804 (2d Dist. 1994) ("'[A]ccident' refers to the insured's intent to commit the act giving rise to liability, as opposed to his or her intent to cause the consequences of that act."). The

definition of occurrence also includes the phrase "neither expected nor intended from the standpoint of the insured" which modifies the term "'injury and damages,' not 'accident.'" See Delgado, 47 Cal. 4th at 311.

Arrowood argues there are six different categories of releases, or alleged releases, from the plating operations and that none of those six categories count as "occurrences" within the meaning of the insurance policies.

1. Concrete Migration Releases

The City argues that fluids fell onto the concrete floor during the plating process and "remained on, and passed through the concrete itself because of its porous nature or possibly through cracks in it." (Def.'s Statement of Facts at ¶ 12.) These "spills of plating fluids and rinse water occurred as bumpers were moved between tanks" and were not "unexpected" or "unforeseen." (Def.'s Opp'n at 16 (Docket No. 55)); see Delgado, 47 Cal. 4th at 308. Any releases that occurred through the regular plating process as fluids fell to the floor for years are not an "occurrence" within the meaning of the insuring agreement. There is no genuine dispute of material fact as to how the fluids spilled onto the floor, and no reasonable jury could find that any release through the concrete was an "occurrence." Accordingly, summary judgment regarding any alleged releases through the concrete floor will be granted in favor of Arrowood.

2. Hole Releases

The City claims that the drain in the plating area would sometimes overflow before a retaining wall was completed in

1974. (See Def.'s Statement of Facts at ¶ 14.) When the drain overflowed, fluids ran out of the area and onto the exterior ground through a hole in the wall. (Id.) Fluids had been spilling out of the hole for nearly 20 years as plating operations occurred. (See Decl. of Alexander Potente ("Potente Decl."), Ex. I, 2019 Depo. of Richard Leland ("2019 Leland Depo.") at 70:14-21 (Docket No. 44-14).) John Clark, the manager of Capitol Plating at the time, piled dirt against the hole to prevent the discharges. (Def.'s Statement of Facts at ¶ 15.) Clark replaced these "dirt dams" five to ten times before building a retaining wall around the plating area to direct fluids down a drain in the floor. (See Def.'s Response to Pl.'s Statement of Additional Facts ("Def.'s Resp. to Pl.'s Add'l Facts") at ¶ 62 (Docket No. 64-1).)

The City unpersuasively argues that Clark did not "intend or expect the dam to fail," therefore the failure of the dams was an "occurrence." (Def.'s Opp'n at 17.) Clark testified that, although he built the dam to "stop[ ] any solution [or] water from coming out" of the hole and thought it would prevent water from escaping, he also expected the dam to fail because "it wasn't concrete" and considered it to be "just a deterrent." (See Potente Decl., Ex. C, 2021 Depo. of John Clark ("2021 Clark Depo.") at 97:6-10, 106:4-19; 196:23-198:4 (Docket No. 44-6).) Clark may not have intended for the dirt dam to fail, but Clark's testimony shows that the dam failing multiple times was not unexpected or unforeseen, as Clark recognized it would not prevent water from escaping indefinitely. See Delgado, 47 Cal. 4th at 308, 311. There is therefore no genuine dispute of

material fact as to the manner in which the releases occurred through the hole, and no reasonable trier of fact could find the releases to be an "occurrence" within the insuring agreement.

3. Sewer Releases

The City claims that "occurrences" happened when fluids from the plating area flowed into the sanitary sewer, but were released into the environment because the sewer may have leaked. (Def.'s Statement of Facts at ¶ 17.) However, the City's expert, Dr. Anne Farr, testified that there is no actual evidence that there were any releases from the sanitary sewer, through cracks and joints, to the subsurface as this had not been investigated. (See Potente Decl., Ex. H, Depo. of Anne Farr ("Farr Depo.") at 30:24-31:2 (Docket No. 44-13).) Even when viewing the facts in the light most favorable to the City, the City has not produced any evidence that releases even occurred from the sanitary sewer, so it cannot carry its burden to demonstrate that these alleged releases are occurrences within the meaning of the insuring agreement.

4. Dumpster Releases

The City claims metal particulates were disposed of in an on-site dumpster and that those particulates escaped into the groundwater and soil through "cracks or gaps in the sides or bottom of the dumpster." (Def.'s Opp'n at 18.) Dr. Farr states that the particulates "likely escaped the dumpster" and that there was contamination in the area. (See Decl. of Bret Stone ("Stone Decl."), Ex. 9, Expert Report of Dr. Anne Farr ("Farr Report") at 21 (Docket No. 56-9); Farr Depo. at 123:24-124:8.) However, Dr. Farr also testified that she does not know what the

condition of the dumpster was and has no evidence that anyone saw discharges from the dumpster. (See Farr Depo. at 122:8-11, 124:1-3.) Clark also testified that he did not recall ever seeing any holes in the dumpster. (2021 Clark Depo. at 120:12-13.)

The City argues that the area in which the dumpster was kept had contamination, but does not provide sufficient evidence that the contamination came from the dumpster and not another source. (See Def.'s Opp'n at 18.) Without evidence that the dumpster released these particulates, the City has not carried its burden to demonstrate that these alleged dumpster releases are "occurrences" within the meaning of the insuring agreement.

5. Fire Releases

The City argues that two fires, one in 1973 and one in 1985, which damaged the grinding and polishing room and jobbing room at the site, each released metallic dust and plating fluids into the environment. (See Def.'s Statement of Facts at ¶¶ 21-22.) The City contends that metals from the polishing, grinding, and jobbing processes were present in these rooms at the time of the fires, that the fires caused some of this metal to be released into the air, and that some of the metal was washed out of the burning structure and onto the ground outside during firefighting efforts. (See Def.'s Mot. at 17 (Docket No. 48-1).) As discussed in detail below, the amount of contamination that may have occurred due to the fires is in dispute. However, the fact that the fires happened is not. At oral argument, Arrowood agreed that both fires are "occurrences" within the policies' insuring agreement.

However, Arrowood contends that the firefighting efforts involved in the two fires are not "occurrences." Arrowood argues that there is no evidence demonstrating whether the firefighters intended to spray the waste materials or rather "accidentally" sprayed the materials and relies on an out-of-circuit case to further its argument. (Pl.'s Mot. at 36) As Arrowood acknowledges, there is no evidence that the firefighters expected, foresaw, and intended to spray the waste materials to release them. Therefore, there is no genuine dispute of material fact as to whether the firefighting efforts are "occurrences." See Delgado, 47 Cal. 4th at 308.

There is therefore no genuine dispute of material fact as to whether the fires and firefighting efforts are "occurrences" within the meaning of the insuring agreement. The court concludes that the fires are "occurrences" within the meaning of the insuring agreement and will therefore grant summary judgment for the City on this point.

6. Rain Releases

The City claims that a large rain event in 1986 likely caused the release of contaminants from the plating area because the roof of the area was not repaired after the 1985 fire. (Def.'s Mot. at 7-8.) Arrowood relies on Travelers Casualty and Surety Company v. Superior Court, 63 Cal. App. 4th 1440, 1464 (6th Dist. 1998), to argue that rain is not a sudden and accidental event, but Travelers does not establish why an unusually large rain event would not qualify as an occurrence and Arrowood makes no argument on this issue. (See Pl.'s Opp'n at 18-21 (Docket No. 52).) A large rain event in this context is

not expected, foreseen, or intended. See Delgado, 47 Cal. 4th at 308. Viewing the facts in the light most favorable to the City, there is therefore no genuine dispute of material fact regarding whether the 1986 rain event is an occurrence. The court determines that the rain event is an "occurrence" within the basic scope of the insuring agreement.

In sum, alleged releases through the concrete floor, hole in the wall, sewer, and dumpster are not "occurrences" within the meaning of the insuring agreement and therefore are not covered by the policies. The fire and rain events are "occurrences" within the meaning of the insuring agreement and are therefore within policy coverage unless an exclusion applies.

B. Pollution Exclusion

The parties also dispute whether either of two exclusions removes the stipulated judgment from coverage under the policies. The first -- the "Pollution Exclusion" -- states that the policies "do[ ] not apply . . . . to bodily injury or property damage arising out of the discharge, dispersal, release or escape of . . . contaminants or pollutants into or upon land, the atmosphere or any water course or body of water."[1] (Potente Decl., Ex. A-1 at 105 (Docket No. 44-1).) The insurer bears the burden of proving a policy's exclusion removes an otherwise-covered claim from coverage. Aydin, 18 Cal. 4th at 1188.

[1] Because the Pollution Exclusion operates to remove otherwise-insured events from coverage, it has no applicability to events not within the basic scope of the policies. Because events that are not "occurrences" within the meaning of the policies are not covered, here the court will address only those events that did constitute occurrences, as explained above.

The City argues that much of the environmental damage at issue does not fall within the scope of the Pollution Exclusion because some of the discharged pollutants traveled through the ground into groundwater, which the City contends does not constitute a "water course or body of water." (See Def.'s Mot. at 15.) However, the City does not contend that any pollutants were discharged directly into groundwater rather than into land. Nor does the City identify any precedent establishing that contamination from pollutants initially discharged into land ceases to fall within the Pollution Exclusion's scope when those pollutants subsequently migrate downward into groundwater.[2]

Rather, a common-sense reading of the Pollution Exclusion's language indicates that "discharge" and similar terms refer to discharges initially made "into or upon land . . . or any water course or body of water," regardless of the subsequent fate of the discharged contaminants. The phrase "into or upon" is in direct reference to the "discharge" event and thus is best read as describing the initial location within the environment into or upon which contaminants are released. The only other district court that appears to have addressed this precise issue

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[2] The authorities the City cites all appear to have involved releases in which pollutants were at least in part discharged directly into groundwater because the releases occurred underground. (See Def.'s Mot. at 15 (citing Aetna Cas. & Sur. Co. v. Dow Chem. Co., 28 F. Supp. 2d 440, 447 (E.D. Mich. 1998); Lumbermens Mut. Cas. Co. v. Plantation Pipeline Co., 447 S.E.2d 89, 93 (Ga. Ct. App. 1994); State v. Travelers Indem. Co. of R.I., 508 N.Y.S.2d 698, 701 (N.Y. App. Div. 1986)).) This stands in contrast to the facts here, as the parties do not seriously dispute that the pollutants were in the first instance discharged into the ground from the surface before some of them migrated downward.

reached the same conclusion. See U.S. Fire Ins. Co. v. Bunge N. Am., Inc., 05-2192-JWL, 2008 WL 3077074, at *5 (D. Kan. Aug. 4, 2008) (citing Mesa Operating Co. v. Cal. Union Ins. Co., 986 S.W.2d 749, 758 (Tex. Ct. App. 1999) (holding same)); see also Standun, Inc. v. Fireman's Fund Ins. Co., 62 Cal. App. 4th 882, 888 (2d Dist. 1998) (distinguishing between initial deposition of waste into landfill and subsequent flow of pollutants from landfill into surrounding environment); Travelers Cas. & Sur. Co., 63 Cal. App. 4th at 1461 (rejecting argument that Pollution Exclusion did not apply to groundwater contamination, as contamination had first been discharged into landfill before migrating into groundwater). Accordingly, that some of the pollutants discharged into or upon the ground at the Site subsequently migrated into groundwater does not remove those discharges from the scope of the Pollution Exclusion.[3]

The undisputed facts show that all relevant discharges identified by the City were "into or upon land" or, in the case of any airborne releases from the two fires, "into . . . the atmosphere." (See Pl's Response to Def.'s Statement of Facts ("Pl.'s Resp. to Def.'s Facts") at ¶ 3 (Docket No. 54); Def.'s Resp. to Pl.'s Add'l Facts at ¶¶ 33-40, 56, 59, 77-88.) There is therefore no genuine dispute of material fact as to whether the discharges at issue here fall within the basic scope of the

[3] Because the court concludes that the Pollution Exclusion encompasses discharges of pollutants "into or upon land" regardless of whether those pollutants subsequently travelled into groundwater, it does not reach the issue of whether groundwater constitutes a "water course or body of water" within the meaning of the policies. (See Def.'s Mot. at 15; Pl.'s Opp'n at 30-31; Def.'s Reply at 16-17 (Docket No. 64).)

Pollution Exclusion, and the court concludes that they do.

1. Sudden and Accidental Exception

The Pollution Exclusion is subject to an exception, however, for discharges that are "sudden and accidental" (the "Sudden and Accidental Exception"). Although an insurer bears the burden of proving that a policy's exclusion precludes coverage of a claim, see Aydin, 18 Cal. 4th at 1188, "[t]he insured under a third party liability policy has the burden of proving . . . an exception to a policy exclusion when the insurer has shown the exclusion applicable," California v. Allstate Ins. Co., 45 Cal. 4th 1008, 1036 (2009) (addressing Sudden and Accidental Exception). Because the Pollution Exclusion applies, the City bears the burden of proving that the releases that qualify as occurrences are covered by the Sudden and Accidental Exception. (See supra n.1.)[4]

When determining whether an event is sudden and accidental, the court must first determine which "particular discharges or discharges . . . gave rise to [the] property damage." See Allstate, 45 Cal. 4th at 1021. It must then evaluate each discharge separately to determine not only whether it was "sudden" and "accidental," but also whether it was a "substantial factor" in the insured's liability. See id. at 1036-37.

An event is "sudden" if it is "abrupt or immediate in nature." Shell Oil Co. v. Winterthur Swiss Ins. Co., 12 Cal.

[4] As noted in the court's prior order, this burden applies notwithstanding the fact that the City is the nominal defendant in this declaratory relief action. (See Docket No. 21 at 8-9.)

App. 4th 715, 755 (1st Dist. 1993). It is "accidental" if it "is both unintended and unexpected" from the standpoint of the insured. Id.; Allstate, 45 Cal. 4th at 1024.

To qualify for the exception, the insured must prove that a sudden and accidental event was also "a substantial cause of the injury or property damage for which the insured is liable." Allstate, 45 Cal. 4th at 1036. Although "[t]he substantial factor standard is a relatively broad one," Bockrath v. Aldrich Chem. Co., Inc., 21 Cal. 4th 71, 79 (1999) (citation omitted), the standard is not met where the insured can do no more than show that the "sudden and accidental event[ ] ha[s] contributed only trivially to the property damage from pollution," Allstate, 45 Cal. 4th at 1037 (citing Travelers Cas. & Sur. Co., 63 Cal. App. 4th at 1460 (insured must show sudden and accidental event caused an "appreciable amount of environmental damage"); Highlands Ins. Co. v. Aerovox Inc., 676 N.E.2d 801, 806 (Mass. 1997) (insured must show sudden and accidental event caused "more than a de minimis amount of the damages for which it is now liable")); see also Bockrath, 21 Cal. 4th at 79 (to qualify as substantial factor, event's contribution must be more than "negligible," "theoretical," or "infinitesimal").

The parties have identified multiple events or forms of discharge that are relevant here. (See Def.'s Mot. at 15-18; Pl.'s Mot. at 32-36.) The court will address each of those that it has determined could constitute an "occurrence" in turn.

2. Fire Releases

The City argues that the September 1973 and September

1985 fires caused sudden and accidental releases of pollutants into the environment. (See Def.'s Mot. at 17.) John Clark and Robert Bennett, who also worked at the facility, testified that each fire destroyed the eastern portion of the facility, which contained the polishing and grinding room and the jobbing room. (See Potente Decl., Ex. F ("Bennett Depo.") at 158:6-16 (Docket Nos. 44-9, 44-10, 44-11); 2021 Clark Depo. at 123:23-124:9.) The City contends that metals from the polishing, grinding, and jobbing processes were present in these rooms each time a fire occurred, that each fire caused some of these metals to be released into the air, and that some of these metals were washed out of the burning structures and onto the ground outside during both firefighting efforts. (See Def.'s Mot. at 17.)

The parties have not put forward evidence regarding the origin of either fire, but the court has already determined that both fires qualify as accidental, and it will likewise assume that each fire qualifies as sudden, there being no indication that either occurred gradually. Even so, the evidence demonstrates that the amount of pollutants released as a result of each fire was not more than trivial or de minimis.[5]

[5] The City is required to prove that each fire was a substantial factor in causing the pollution for which the insureds were liable. See Allstate, 45 Cal. 4th at 1021, 1036-37. However, in its briefing the City simply states that all identified releases were substantial factors in causing the Site's pollution without individually addressing whether each fire was a substantial factor and why. (See Def.'s Mot. at 18; Def.'s Reply at 24-25; Def.'s Opp'n at 25-26.) Nonetheless, the court has examined the available evidence in order to make this determination for itself.

The City's observation that Arrowood stipulated that its insureds' "conduct was a substantial factor in causing the nuisance and condition of pollution or nuisance at the Site,"

The City argues that some of the relevant pollution occurred when plating fluids present in the jobbing room were discharged to the ground by the fires or firefighting efforts. (See Def.'s Mot. at 17.) It relies on Dr. Farr's report, in which she states that plating of small parts for cars occurred in the jobbing room, citing Bennett's deposition. (See Farr Report at 18-19 (citing Bennett Depo. at 40:1-2).) On this basis, in her rebuttal report she also states that "[t]he destruction of the jobbing area would have resulted in a substantial contribution of contamination to the northeastern area of the Site." (Stone Decl., Ex. 10, Expert Rebuttal Report of Anne Farr ("Farr Rebuttal") at 12 (Docket No. 56-10).)

However, in the portion of Bennett's deposition Dr. Farr cites, Bennett merely stated that the room in question "was small jobbing, what we call small parts for cars." (Bennett Depo. at 39:23-40:2.) He did not state, then or at any other point during his deposition, that any plating occurred in the jobbing room. (See generally id.) Dr. Farr's assertion that it did thus appears to represent an unsupported inference from Bennett's testimony and is therefore insufficient to create a triable issue of fact.[6] Arrowood, on the other hand, has

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(Def.'s Mot. at 18), evinces an apparent related misconstruction of the legal standard. A stipulation that the insured's overall conduct was a substantial factor is not the same as a stipulation that each (or any) discrete sudden and accidental event was.

[6] Accord Travelers Cas. & Sur. Co., 63 Cal. App. 4th at 1662 ("Expert declarations cannot create a triable question of fact if the expert's opinion is based upon factors which are remote, speculative, or conjectural. Particularly, expert declarations regarding purported sudden and accidental releases of pollution, which do no more than offer conclusory assertions or speculation regarding any causal link between the purported

submitted a declaration from Bennett specifying that the jobbing room was used for polishing small car parts and that no plating was in fact done there. (See Potente Decl., Ex. G at ¶ 3 (Docket No. 44-12).)[7] There is accordingly no genuine dispute of material fact as to whether plating fluids would have been present in the jobbing room at the time of the fires and would therefore have escaped during firefighting efforts.

The City also contends that fluid likely escaped from tanks in the plating room because the chrome tank was uncovered and thus water may have entered during firefighting efforts. (See Def.'s Mot. at 17.) The only evidence that might support this inference is hearsay testimony from Richard Leland, another employee, who testified at his deposition that although there was no damage to the plating room from the 1985 fire, he was told by another person that some water from the firefighting effort had entered tanks in the plating room, diluting some of their contents. (See 2019 Leland Depo. at 89:6-16, 90:3-19.) He did not testify that he was told any fluid escaped. (See id.) But he did testify that he did not visit the property for about one

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releases and the claimed damages, are insufficient to defeat summary adjudication.") (citations omitted).

[7] The City has objected to consideration of Bennett's declaration for purposes of the cross-motions for summary judgment. (See Docket No. 61-2.) Although the City states that the declaration was signed after the close of discovery and that statements it contains were not part of Bennett's deposition testimony, the City does not explain how consideration of the declaration would be prejudicial. It also argues that the statements it contains cannot be presented in an admissible form, but there is no indication that Bennett could not personally testify to these details at trial, much as he could be called to testify to the details he disclosed during his deposition. The City's objection is therefore overruled.

week after the fire and that when he did, he did not see evidence that water had been sprayed into the plating room. (See id. at 90:8-17.)

On the other hand, Clark and Bennett each testified that they arrived at the facility on the mornings after the 1973 and 1985 fires, respectively, and saw no evidence water had been sprayed into the plating area on either occasion. (See 2021 Clark Depo. at 123:3-14, 128:12-130:6; Bennett Depo. at 167:24-168:20.)[8] Dr. Farr's conclusion that fluid from the chrome tanks were "likely" released during the fires is therefore speculative, and the court concludes that there exists no genuine dispute of fact on this point. See Allstate, 45 Cal. 4th at 1037 (Sudden and Accidental Exception does not apply "where the policyholder can do no more than speculate that some polluting events may have occurred suddenly and accidentally"); Bockrath, 21 Cal. 4th at 79 ("theoretical" contribution to harm insufficient to qualify as substantial factor in causing it); Travelers Cas. & Sur. Co., 63 Cal. App. 4th at 1462.

Finally, the City argues that waste metals which would have been present in the polishing and grinding room would have been washed out during firefighting efforts. (See Def.'s Mot. at 17.) In that room, during the relevant periods for both fires,

[8] Moreover, even if some fluid had spilled out of the chrome tanks during either fire, there is no evidence indicating that this fluid was discharged from the building by means other than the floor drain leading to the sewer. And it is undisputed that by the time of the 1985 fire, a retaining wall had been built around the plating area, preventing any releases through the hole in the wall. (See Def.'s Resp. to Pl.'s Add'l Facts at ¶ 65.)

workers buffed and sanded bumpers to prepare them for plating, a process which produced fine metal particles. (Def.'s Resp. to Pl.'s Add'l Facts at ¶¶ 80-81.) These particles either fell onto the floor or onto instruments in the room, or they were sucked into a dust collector on the wall that was present at the times of both fires. (Id. at ¶ 82; Stone Decl., Ex. 2 ("2020 Clark Depo.") at 93:1-94:1 (Docket No. 56-2); Bennett Depo. at 166:3-15.) Clark and Bennett testified that at the end of each day, particles that landed on instruments in the room were blown off, the floor was swept, and the dust was collected into a garbage bag and disposed of. (2021 Clark Depo. at 48:11-52:20; Bennett Depo. at 54:8-57:6, 58:23-59:22, 157:12-15, 162:16-164:20.)[9]

Despite Bennett's testimony that all of the residue produced in the straightening, polishing, and grinding areas was removed during each cleaning, (see Bennett Depo. at 59:15-22, 233:14-22), the City argues that some amount of dust would have necessarily remained and therefore would have burned or been washed away during each fire, (see Def.'s Mot. at 17; Farr Report at 16; Farr Rebuttal at 11). The possibility that a small amount of residual dust not cleaned up at the end of the day may have remained when the fires started, however, does not establish that

[9] Although the City disputes that Clark's and Bennett's testimony conclusively establish that these cleanings occurred daily, (see Def.'s Resp. to Pl.'s Add'l Facts at ¶ 83), it puts forward no evidence to the contrary. Additionally, although the City contends that Bennett did not personally perform these cleanings beyond the early part of his employment at the facility, Bennett testified that he had never arrived at the grinding and polishing room in the morning to find that it had not been cleaned the night before. (See Bennett Depo. at 164:17-20.)

more than a trivial amount would have been present and discharged during the fires.

Some of the particles produced in the polishing and grinding room were also sucked into the dust collector, which consisted of a fan in the wall that pulled airborne particles through a duct and into a bag for disposal. (See 2020 Clark Depo. at 93:1-22; Bennett Depo. at 166:3-167:12.) Clark testified that this bag was disposed of frequently enough that it was not allowed to become full. (See 2020 Clark Depo. at 93:6-19.) Although his and Bennett's testimony conflicted as to whether the bag was disposed of every day, (compare id. at 93:17-22 with Bennett Depo. at 167:13-23), the mere possibility that some metal dust would have been in the dust collector at the time of the fires is insufficient to create a genuine dispute of material fact as to whether any amount of dust discharged during the fires would have been non-trivial.[10] See Allstate, 45 Cal. 4th at 1037.

On the evidence presented, a reasonable trier of fact could not conclude that either the 1973 or 1985 fire caused more than a trivial amount of contamination to the site, and thus could not conclude pollution from either fire was a substantial

[10] In his expert report, Delfino estimated that at the end of the average day, the total amount of dust that would have remained in the polishing and straightening rooms each day, including in the dust collector, would have been between 0.0144 and 2.08 pounds. (See Stone Decl., Ex. 18, Expert Report of Thomas Delfino at 12-13 (Docket No. 48-21).) Although Dr. Farr contests the accuracy of these estimates, and therefore the court does not rely on them in reaching its conclusion, they nonetheless represent additional evidence that the amount of metal discharged during the fires was negligible. See Bockrath, 21 Cal. 4th at 79.

factor in causing the damage for which the insureds were liable. See id. The court will therefore deny summary judgment on this point for the City and grant it for Arrowood.

3. Rain Releases

The City also argues that a rain event in February 1986 caused a sudden and accidental release of pollutants. (See Def.'s Mot. at 17.) It contends that the plating area's roof was damaged during the 1985 fire and was not repaired, and that the rain would have then entered through the missing portion of the roof. (See id.) It argues that this "would have resulted in further migration of the contamination at and under the plating building as a result of infiltration of water through the plating building foundation." (Id.)

Although Leland testified that the 1985 fire "did some damage in the plating department," he does not appear to have specified that the roof was damaged. (See Stone Decl., Ex. 6, 2020 Deposition of Richard Leland ("2020 Leland Depo.") at 38:16-39:6 (Docket No. 48-11).) On the other hand, Bennett testified that he arrived at the facility the morning after the 1985 fire and saw no damage to the plating area, including to the roof. (See Bennett Depo. at 167:24-168:12, 174:10-17, 175:13-15.)

Bennett also testified that the facility was not repaired or rebuilt after the 1985 fire. (See id. at 168:21-169:11.) He testified that beginning roughly one week after the fire, he and another person cleaned and packed up the plating shop, including by emptying the tanks, storing the solution in waste barrels, removing the tanks and other equipment from the premises, and cleaning the plating room. (See id. at 176:20-

180:22, 237:2-15.)

The City has not put forward evidence to indicate that any meaningful amount of plating materials or other residual contaminants were present in the plating room at the time of the rain -- whereas Arrowood has put forward evidence to the contrary -- and that would thus have migrated downward through the floor in the manner the City suggests. To the extent that the City argues the rain caused contaminants that had already passed through foundation and into the soil to migrate further downward, precedent makes clear that this does not constitute a discharge that may satisfy the Sudden and Accidental Exception. Cf. Standun, 62 Cal. App. 4th at 889-90 (holding, in suit over release of pollutants from landfill into surrounding environment, that discharge to be analyzed for purposes of Sudden and Accidental Exception is initial deposition of wastes into landfill, not subsequent migration of pollutants therefrom); Travelers Cas. & Sur. Co., 63 Cal. App. 4th at 1463 (citation omitted).

Even viewing the evidence in the light most favorable to the City, and therefore assuming that there was indeed a hole in the roof after the 1985 fire, the City has failed to show that a non-trivial amount of contaminants would have been present in the plating room at the time of the rain and could therefore have been discharged from the building because of the rain. The only evidence on this point is that which Arrowood has offered, which demonstrates the opposite. Accordingly, the court concludes that there is no genuine dispute of material fact and that, on the evidence presented, a jury could not reasonably conclude that the

1986 rain event caused a sudden and accidental discharge of pollutants. Therefore, on this issue, the court will deny the City's motion and grant summary judgment for Arrowood.

Because the court has concluded that none of the events that qualify as occurrences fall within the Sudden and Accidental Exception, the contamination for which the City seeks indemnification is excluded from coverage under the policies' Pollution Exclusion.[11]

IT IS THEREFORE ORDERED that the City's motion for summary judgment be, and the same hereby is, DENIED.

IT IS FURTHER ORDERED that Arrowood's motion for summary judgment be, and the same hereby is, GRANTED.

The Clerk is hereby directed to enter Judgment, pursuant to 28 U.S.C. § 2201, declaring that plaintiff Arrowood Indemnity Company has no duty to satisfy the Judgment entered against R and L Business Management, John Clark, and the Estate of Nick Smith in the case City of West Sacramento v. R and L Business Management, 2:18-cv-900 WBS JDP, and to close the file accordingly.

IT IS SO ORDERED

Dated: January 11, 2022

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

[11] Because the Site contamination is excluded from coverage under the Pollution Exclusion, the court does not reach the issues of whether the Owned Property Exclusion applies or of what the applicable policy limits would be for non-excluded occurrences.